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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE

ARBITRATION PETITION NO. 47 OF 2004

M/s. Duwell Agency .. Petitioner

Vs.

Union of India and ors. .. Respondents

Mr. R.G. Ketkar for petitioner.
Mr. Anil Singh with Mr. D.A. Dube and Mr. Suresh
Kumar for respondents.

CORAM : B. H. MARLAPALLE,J.

Date : March 03, 2006.

P.C.:

1. Heard Mr. Ketkar, the learned counsel for the petitioner and Mr. Singh with Mr. Dube and Mr. Suresh Kumar, the learned counsel for the respondents. This arbitration petition was admitted by the order dated 13/1/2006 and thereafter the respondents have filed additional replies and both the parties have also placed on record copies of additional documents.

2. On 8/10/2003 the petitioner had raised a dispute regarding the settlement of claims arising from the contracts undertaken for two different years, namely, C.A. No.CENM - 25 of 1995-96 and C.A.No.CENM -09 of 1996-97. As the claims were not settled, the petitioner approached this court in Arbitration Petition No.27/2004 and prayed for reference to the

sole Arbitrator to adjudicate upon the claims for two different years. For the year 1995-96 the petitioner had sought reference in respect of 15 claims and for the subsequent period it had sought reference in all eight claims. The Arbitration Petition No.27 of 2004 was decided by this court by order dated 30/4/2004 and the Engineer-in-Chief, Army Head Quarters, New Delhi was directed to appoint a sole Arbitrator to adjudicate upon the disputes between the petitioner and respondent within a period of four weeks. Consequently, the Engineer-in-Chief passed an order on 14/5/2004 and appointed Brigadier Amarjit Singh as the sole Arbitrator for the claims pertaining to the year 1996-97. The petitioner noticed that claim no.3 for the year 1996-97 was not referred for adjudication by the sole Arbitrator and, therefore, it approached this court in Arbitration Petition No.35 of 2004 which was decided by this court on 24/8/2004 directing that claim no.3 shall also be referred to the sole Arbitrator along with other claims for the year 1996-97.

3. The Engineer-in-Chief passed another order dated 9/8/2004 and appointed Brigadier Amarjit Singh as the sole Arbitrator for the contract pertaining to the year 1995-96, but as per the petitioner clause nos.6 and 7 came to be deleted. Hence the petitioner

has approached in the third round before this court.

4. The respondents have opposed this petition, firstly, by relying upon condition no.70 stating that the said clause prohibits reference to arbitration of the agreement which are covered under the expressed provisions of contract. The said Clause No.70 reads as under:-

"70. Arbitration- All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of a serving officer having degree in Engineering or equivalent or having passed final/direct final examination of Subdivison-II of Institution of Surveyor (India) recognised by the Government of India."

5. It is, therefore, required to be considered whether Claim nos.6 and 7 are hit by Condition No.70 of the contract pertaining to the clause of

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arbitration. As noted earlier, Arbitration Petition No.35 of 2004 was filed on being aggrieved by deletion of the Claim No.3 and this court by the order dated 24/8/2004 also referred the same claim for arbitration for the year 1996-97. Clause No.3 reads as under:-

3. Loss sustained due to abnormal increase in quantities of certain items of schedule "A" Rs.21,28,054.37

It is pertinent to note that Clause 3 of the claim raised by the earlier order is verbatim the same except the difference in the amount as is clear from the language of the present claim no.7 as reproduced hereinbelow:-

7. Loss sustained due to abnormal increase in quantities of certain items of schedule "A" Rs.10,54,291.72

6. Thus, the respondents cannot now take a position that either clause 7 of the claims raised for the year 1995-96 cannot be referred to arbitration as they are bound by the order passed by this court on 24/8/2004 in Arbitration Petition No.35/2004 and hence objection raised to the reference of item no.7 for arbitration is hereby rejected.

7. So far as item no.6 is concerned, it reads as

under:-

6. Loss sustained due to
fixing of star rates
unilaterally defying
condition 62(G) of IAFW-2249
by not considering actual
cost incurred at site of
works Rs.21,85,627.24

8. Admittedly, this item pertains to the fixation of star rates by the C.W.E. In the return submitted by the respondents it is alleged that Claim No.6 cannot be entertained for reference to arbitral proceedings as the C.W.E. has communicated the fixation of rates by his letter dated 13/1/2004 and the delay caused was solely because of the reasons attributable to the petitioner-firm on account of the alleged non submission of realistic vouchers for materials. There is no dispute that these rates have been finalised by the C.W.E. after the petitioner had raised the dispute on 8/10/2003 and this court while allowing Arbitration Petition No.27 of 2004 had directed all the claims to be referred to the sole Arbitrator. This order has received finality and it cannot be made subject to the interpretations given by the respondents now and during the last about two years there is nothing shown that the said order was challenged before any higher forum and it was modified. In any case, if the respondents contend

that Clause 62(G) of the of the contract comes in the way of the sole Arbitrator in adjudicating the said item, it is for the Arbitrator to decide that as the preliminary objection under Section 16(3) of the Arbitration and Conciliation Act, 1996. Clause 62(G)

reads as under:-

"62. Valuation of Deviations.- The value of work covered by deviation orders shall be ascertained by measurements or lump sum assessment in the following order of precedence:-

- (A)
- (B)
- (C)
- (D)
- (E)
- (F)

(G) For all Contracts -

. If any Work, the rate for which cannot be obtained by any of the methods referred to in paras (A) to (E) above, has been ordered on the Contractor, the rate shall be decided by the G.E. on the basis of the cost to the Contractor at Site of Works plus 15% to cover all overheads and profit. Provided that if the Contractor is not satisfied with the decision of the G.E., he shall be entitled to represent the matter to the C.W.E. within seven days of receipt of the G.E.'s decision and the decision of the C.W.E. thereon shall be final and binding.

. If any alterations or additions (other than those authorised to be executed by day work or for an agreed sum) have been covered up by the Contractor without his having given notice of his intention to do so, the Engineer-in-Charge shall be entitled to appraise the value thereof and in the event of any dispute the decision of the G.E. thereon shall be final and binding."

9. For the reasons set out hereinabove this

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petition succeeds and the same is hereby allowed and it is directed that item nos.6 and 7 of the claims pertaining to the year 1995-96 and as referred to hereinabove shall be referred to the sole Arbitrator i.e. Brigadier Amarjit Singh or his successor as the case may be within a period of four weeks from today by the Competent Authority i.e. Engineer-in-Chief. It is further clarified that in case the respondents present an application under Section 16(3) of the Arbitration and Conciliation Act, 1996 in respect of item no.6, the same shall be considered on its own merits and without being influenced by any observations made in this order.

10. Rule made absolute in terms of the above directions.

(B.H. Marlapalle, J.)